91-577

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BONITA PASCHAL, DANIEL DODSON, PAUL BUCASAS and all others similarly situated,

Petitioners,

v.

LOLETA DIDRICKSON, the Director of the Illinois Department of Employment Security; STELLA CUTHBERT, the Commissioner of the Illinois Department of Employment Security; LYNN MARTIN, the Secretary of the United States Department of Labor; ROBERTS T. JONES, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor; and the UNITED STATES DEPARTMENT OF LABOR,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case challenging the conduct of state officials as violative of the Due Process Clause of the Fourteenth Amendment to the United State Constitution, does the Eleventh Amendment to the United States Constitution bar a judgment for restitution of funds that would be fully paid by the federal government?

2. In a case challenging the conduct of state officials as violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, does the Eleventh Amendment to the United States Constitution bar a judgment for restitution of funds that are segregated by law from the state's general revenues?

3. Should Hans v. Louisiana, 134 U.S. 1 (1890) and the reach of the Eleventh Amendment to the United States Constitution be confined to suits in which states or their officials are alleged to have violated state

law, thereby limiting the jurisdictional bar against such suits in federal court to state law claims but preserving a common law sovereign immunity defense for states and their officials against federal claims?

PARTIES TO THE PROCEEDINGS

A. Petitioners are:

1. Bonita Paschal, Daniel Dodson on their own behalf and on behalf of the certified plaintiff class they represent, defined as: "all persons who have made, are making or will make claims to the Illinois Department of Employment Security ("IDES") for federal supplemental compensation pursuant to Pub. L. 97-248 (as amended) and who have been, are being, or will be denied federal supplemental compensation by IDES on the ground that they have been unavailable for and/or failed actively to seek work", see Partial Settlement Order (App. 518)[1]; and

2. Paul Bucasas on his own behalf and on behalf of the certified plaintiff class he represents, defined as: "all persons who have made, are making or will make claims to IDES for extended benefits pursuant to the

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[1] We cite the separate appendix filed herewith as "App.".

Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. § 3304(a)(11), note Pub. L. 91-373, §§ 201-207 (as amended), and who have been, are being or will be denied extended benefits by IDES on the ground that they have been unavailable for and/or failed actively to seek work," see Partial Settlement Order (App. 518).[2]

B. Respondents are:

1. The Director of IDES in her official capacity, a position now occupied by Loleta Didrickson; the Commissioner of IDES in her official capacity, a position now occupied by Stella Cuthbert; and

2. The Secretary of the United States Department of Labor, in her official capacity, a position now occupied by Lynn Martin; the Assistant Secretary for the Employment and Training Division of the United States Department of Labor, a position now occupied by Roberts T. Jones; and the United States Department of Labor.[3]

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[2] We refer to Bonita Paschal, Daniel Dodson and the class of persons who applied for FSC benefits as the "FSC claimants;" Paul Bucasas and the class of persons who applied for EB as the "EB claimants;" and all three of the named plaintiffs and the members of both classes as the "claimants."

[3] We refer to the Director and the Commissioner of the Illinois Department of Employment Security as "IDES;" and the Secretary of the United States Department of Labor, the Assistant Secretary for the Employment and Training Division of the United States Department of Labor, and the United States Department of Labor as "USDOL."

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Bonita Paschal, Daniel Dodson and Paul Bucasas, on behalf of themselves and the plaintiff classes they represent, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Petitioners seek review of the court of appeals' judgment and opinion below holding that restitution of unemployment insurance benefits that the petitioners lost because of IDES's unconstitutional conduct is barred by the Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI. That judgment and opinion (App. 1) is reported at 936 F.2d 940. The court of appeal's earlier opinion on the merits of the petitioners' claims (App. 38) - as to which petitioners do not seek review here - is reported at 843 F.2d 967. The opinion of the district court on the Eleventh Amendment issue (App. 24), which was affirmed by the court of appeals, is reported at 741 F. Supp. 740. The district court's opinion on the merits of the petitioners' claims (App. 133), which was reversed, in part, by the court of appeals is reported at 625 F. Supp. 619.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1991. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Article III, Section 2 of the United States Constitution provides, in relevant part, that:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... to Controversies ... between a State and Citizens of another State; ... and between a State ... and foreign States, Citizens or Subjects.

II. The Supremacy Clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, provides, in relevant part, that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws

of any State to the Contrary notwithstanding.

III. The Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

IV. 28 U.S.C. § 1331 provides that:

> The district courts shall have original jurisdiction of all civil actions ... aris[ing] under the Constitution, laws, or treaties of the United States.

V. The full texts of the other statutory provisions involved in this case are voluminous and, therefore, are included in a separate appendix. Those provisions are: The Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3304 (1988 and Supp. I 1989); The Federal-State Extended Unemployment Compensation Act of 1970, 26 U.S.C. § 3304 (1988), note Pub. L. 91-373, §§ 201-207 (as amended); The Federal Supplemental

Compensation Act of 1982, 26 U.S.C. § 3304 (1988), note Pub. L. 97-248, §§ 601-606 (as amended); The Social Security Act, §§ 301-303, 42 U.S.C. §§ 501-503 (1988); The Social Security Act, §§ 901-905, 42 U.S.C. §§ 1101-1105 (1988); The Illinois Unemployment Insurance Act, §§ 403.B., 409., 2100., 2101., 2103. and 2900., Ill. Rev. Stat. ch. 48, ¶¶ 403.B., 409., 660., 661., 663., 790. (1990).

STATEMENT OF THE CASE

I. THE STATUTORY FRAMEWORK

A. The Two Unemployment Insurance Programs At Issue

This case concerns two types of unemployment insurance benefits. The first is extended benefits ("EB"). See The Federal-State Extended Unemployment Compensation Act of 1970 ("EUCA"), 26 U.S.C. § 3304, note Pub. L. 91-373, §§ 201-207 (as amended) (App. 289-315); Section 409 of the Illinois Unemployment Compensation Act ("IUIA"), Ill. Rev. Stat.

ch. 48, ¶ 409. (App. 472). The second is federal supplemental compensation ("FSC") benefits. See The Federal Supplemental Compensation Act of 1982 ("FSC Act"), 26 U.S.C. § 3304, note Pub. L. 97-248, §§ 601-606 (as amended) (App. 318-341).

Unemployment insurance is "a cooperative federal-state program of benefits to unemployed workers." St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 775 (1981). In Illinois, claimants can receive a maximum of 26 weeks of regular benefits. Ill. Rev. Stat. ch. 48, ¶ 403.B. (App. 471). During sufficiently severe recessions, however, EUCA provides up to 13 additional weeks of EB to individuals who have exhausted their rights to receive regular benefits. EUCA, § 202(a)(1), (b)(1) (App. 289,299); Ill. Rev. Stat. ch. 48, ¶¶ 409.C., F. (App. 478, 483). EB are only available in a state when it is experiencing a recession severe enough to trigger an "indicator" that

switches EB "on" in that state. EUCA, § 203(a)(1), (c), (d)(1) (App. 302, 303-304); Ill. Rev. Stat. ch. 48, ¶ 409.A.1., 2. (App. 472-473). Conversely, when economic conditions in a state reach a point prescribed by EUCA, EB switches "off." EUCA, § 203(a)(2), (d)(2) (App. 302, 304-305); Ill. Rev. Stat. ch. 48, ¶ 409.A.1., 3. (App. 472, 473-474). EB has not been "on" in Illinois since June, 1983.

The FSC program was a temporary program that provided additional weeks of unemployment insurance for individuals who had exhausted both regular benefits and any EB that they were entitled to receive. See FSC Act, § 602(b)(1) (App. 318-319). Except to exhaust pending claims, FSC benefits have not been payable for any week beginning after March 31, 1985. FSC Act, § 602(f)(2) (App. 334-335).

B. The Funding Of Unemployment Insurance Benefits

The first two questions presented for review ask whether the Eleventh Amendment to the United States Constitution bars a federal court from ordering restitution of EB and FSC benefits even though such relief would not "come from the general revenues of the State of Illinois." Edelman v. Jordan, 415 U.S. 651, 665 (1974). FSC benefits are funded entirely by the federal government. For each state that entered into an agreement to participate in the FSC program, the federal government advanced or reimbursed 100 percent of the FSC paid to individuals by the state. FSC Act, §§ 603(a), 604 (App. 336,338). In addition, the FSC Act authorized funds to be appropriated "for purposes of assisting the States ... in meeting the costs of the administration of ... [the FSC program]." FSC Act, § 604(c) (App. 339-440); see 42 U.S.C. § 1101(c)(1)(A)(i) (App. 429-430).

One half of EB are also reimbursed from the federal treasury. See EUCA, § 204 (App. 306).[4] Like all of regular unemployment insurance benefits, the other half of EB are paid from the unemployment trust fund. 42 U.S.C. § 1104 (App. 457); 26 U.S.C. § 3304(a)(3) (App. 266-267); see California v. Java, 402 U.S. 121, 126 (1971). But even the money in the unemployment trust fund is not the state's money.

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[4] The federal government also assists the states in meeting their costs of administering the EB program. See 42 U.S.C. §§ 501, 502, 1101(c)(1)(A)(i), 1103(c)(2), Ill. Rev. Stat. ch. 48, ¶ 663. (App. 399, 429-430, 453, 512). If federal money is insufficient to cover administrative costs for any of IDES's unemployment insurance programs, additional funds are available to IDES in its "special administrative account" which is comprised of interest and penalties collected from employers who fail to make timely contributions. Ill. Rev. Stat. ch. 48, ¶ 661. (App. 506). Like all of the money used in the state's unemployment insurance program, the federal funds for administering the program and the funds in the special administrative account are kept "separate and apart from all other State moneys." Id. at ¶ 663. (App. 512).

The trust fund is financed by a federal excise tax paid by the nation's employers based on the total wages each paid to its employees. Federal Unemployment Insurance Tax Act ("FUTA"), 26 U.S.C. § 3301 (App. 216); St. Martin, 451 U.S. at 775 n. 3. Employers do not normally pay their whole FUTA tax, however, because those who pay contributions to a state unemployment insurance program that complies with federal law[5] enjoy a credit against their federal unemployment tax obligations. 26 U.S.C. §§ 3302, 3303 (App. 216, 249). Under the federal law, the contributions collected by IDES are immediately turned over to the federal government.[6] 26 U.S.C. § 3304(a)(3) (App.

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[5] The Secretary of Labor certifies whether each state has complied with FUTA. 26 U.S.C. § 3304 (App. 266). See 42 U.S.C. §§ 502, 503 (App. 399, 401).

[6] A detailed description of the accounts used to transfer contributions to and from IDES and the federal unemployment trust fund is described in the court of appeals' opinion (App. 7-13).

266-267); 42 U.S.C. § 503(a)(4) (App. 402); Ill. Rev. Stat. ch. 48, ¶ 660. (App. 494). And, though they are then credited to Illinois' account in the unemployment trust fund, IDES may requisition them "solely for the payment of benefits" or related expenses. 26 U.S.C. § 3304(a)(4) (App. 267); 42 U.S.C. § 503(a)(5) (App. 402-404); Ill. Rev. Stat. ch. 48, ¶ 660. (App. 494). Moreover, to assure that employers in Illinois receive FUTA credit, IDES must comply with all federal requirements governing the unemployment insurance programs. 42 U.S.C. §§ 501, 503(a) (App. 399, 401-406); 26 U.S.C. §§ 3302(c)(3), 3304(c) (App. 225-227, 284-286). Thus, Illinois merely acts as the federal government's agent for collecting and dispersing part of the revenues necessary to operate the country's unemployment insurance program.

Even if the money in the federal unemployment trust fund could properly be

characterized as Illinois' money, it is not the state's general revenues. All money used by IDES for payment of benefits or for administration of its unemployment insurance program must be kept "separate and apart from all public moneys or funds of th[e] State." Ill. Rev. Stat. ch. 48, ¶¶ 660.A., 663. (App. 495-96, 513); see id. ¶ 660.A. (App. 500, 502). And Illinois assures both that the money in the accounts that it uses to fund its unemployment insurance program "shall not be commingled with other State funds," id. at ¶ 660.A. (App. 502), and that those accounts are "administered by the Director [of IDES] exclusively for the purposes of ... [the IUIA]." Id. at App. 496. Moreover, the state's general revenues could never be used to pay unemployment insurance benefits because "[t]he monies payable under [the IUIA] ... shall be the sole and exclusive source for the payment of benefits payable under [that Act]." Id. at ¶ 790. (App. 517).

Accordingly, the Illinois Supreme Court has repeatedly "reject[ed] th[e] argument ... that the enforced contributions made under the [IUIA] should be recognized as a [state] tax rather than an insurance program." Garland v. Department of Labor, 104 Ill. 2d 383, 390-92, 472 N.E.2d 434, 437 (1984) (collecting authorities).

II. THE PETITIONERS' CLAIMS AND THE DISPOSITION OF THE CASE BELOW

Petitioners are Illinois citizens who represent two classes of unemployment insurance claimants: those who filed claims for EB with IDES, and those who filed claims for FSC with IDES. The petitioners brought this case pursuant to 42 U.S.C. § 1983 to challenge policies and practices that IDES used to determine whether EB and FSC claimants had "actively engaged in seeking work" as required by both EUCA, § 202(a)(3)(A)(ii), (E) (App. 296), and the FSC Act, § 602(d)(2)

(App. 321). As relevant here, the petitioners claimed that IDES violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, sec. 1, cl. 3, and the "fair hearing" clause of Section 303(a)(3) of the Social Security Act[7], 42 U.S.C. § 503(a)(3) (App. 403).

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[7] The "fair hearing" clause requires that state unemployment insurance statutes provide an "[o]pportunity for fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3) (App. 402). Like other federal courts, the Seventh Circuit in this case treated the "fair hearing" requirement as one "tested by the same standards as constitutional due process." App. 98 (quoting Camacho v. Bowling, 562 F. Supp. 1012, 1020 (N. D. Ill. 1983) (citing Ross v. Horn, 598 F.2d 1312, 1318 n.4 (3d Cir. 1979)). This appeal raises questions about the relief available for violations of the fair hearing and due process provisions, but it does not present any question about whether those two provisions are tested by the same standards. For convenience, therefore, we use the term "due process" to mean both the statutory fair hearing requirement and the constitutional due process requirement.

The petitioners invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343(3). In the earlier appeal, the court of appeals affirmed the district court's holding that it had jurisdiction over the dispute under 28 U.S.C. § 1331. App. 68-74.

After the district judge dismissed the case under Fed. R. Civ. P. 41(b), App. 133-215, the court of appeals reversed, in part, holding that petitioners had presented sufficient evidence to prove that IDES had violated the claimants' due process rights by giving them inadequate notice of their work search responsibilities and of the issues to be raised at the hearings at which the claimants' compliance with the work search requirements were adjudicated. App. 99-116. "Because the district court terminated the trial after the plaintiffs presented their case, [the court of appeals] remand[ed] to give the defendants an opportunity to rebut

the plaintiffs' evidence...." Id. at App. 115.

The case was not retried, however. Instead, the parties entered into a Partial Settlement Order. App. 518-22. The settlement is "partial" in that it provides only prospective relief and only for the EB claimants. App. 525-529. No prospective relief was provided to the FSC claimants, because FSC was paid pursuant to a temporary program that has ended. FSC Act, § 602(f)(2) (App. 334-335). And even the prospective relief for the EB program is contingent because the EB program lies dormant until the program is triggered "on" by adverse economic conditions. See EUCA, § 203(d) (App. 303-305).

The Partial Settlement Order also provided, however, that the parties would litigate questions regarding petitioners' remaining claims for retroactive relief. App.

530-531.[8] After the district judge approved the settlement, IDES moved to dismiss those claims on the ground that the Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, deprives a federal court of the jurisdiction to award the claimants retroactive relief. The district court granted IDES's motion holding that the case was controlled by Edelman v. Jordan, 415 U.S. 651 (1974) even though a judgment for unemployment insurance benefits would not affect the state's general revenues and, at least as to FSC benefits, a judgment would be wholly paid by the federal government. App. 24-37. The district judge reasoned that since "[r]etroactive relief would bind the state in its role as the sovereign," it did

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[8] Specifically, petitioners sought "a declaratory judgment, payment of lost EB and FSC benefits, re-adjudication of their claims to EB and/or FSC, notice relief, and/or such other retroactive relief as the [District] Court would allow." Partial Settlement Order ¶ IV.A.2. (App. 530-531).

not matter "[t]hat Illinois could recoup the outlay from someone else...." Id at App. 32.

The district court "enter[ed] a final judgment approving the [partial] consent decree and otherwise dismissing the complaint on the basis of the eleventh amendment." Id. at App. 37. On petitioners' appeal, the court of appeals affirmed. Id at App. 22-23. The case, therefore, comes to this Court from a final order.

The court of appeals rejected the teaching of what it characterized as "admittedly ample authority that recognizes that a lawsuit is not against the sovereign when the relief has no impact upon the state itself." App. 15. Instead, the court of appeals "prefer[red] an approach that disregards the source of state funds" because, it said, to consider the source of the funds, "forces courts ... to determine whether the

defendant department or subdivision is indeed 'the state.'" Id. at App. 18.

The court of appeals acknowledged not only that the federal treasury pays for all of FSC and one half of EB, id. at App. 11-12, but also that, since the other half of EB is financed from the unemployment trust fund, all of EB is "financed entirely with federal funds." Id. at App. 6. The court of appeals also acknowledged that the federal government assists states in paying the costs of administering those programs. Id. at App. 12-13. Furthermore, since the federal government has waived its sovereign immunity against suits for such expenses, it is amenable to suits by states seeking reimbursement of these funds. Bowen v. Massachusetts, 487 U.S. 879 (1988). Nonetheless, the court of appeals held that "[i]n an era of mandatory budget reduction and rising unemployment rates, there is no guarantee that the federal government will

continue to be 'Johnny-on-the-spot' with ready cash in hand." App. 19.

The court of appeals relied on this Court's decisions in Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946) and Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944), which concerned state tax revenue destined for the states' general revenues but separated from them while a dispute concerning the assessments was resolved. App. 19-20; see Kennecott Copper, 327 U.S. at 576; Great Northern Life Ins. Co., 322 U.S. at 53. In contrast, the funds segregated for payment of unemployment insurance in Illinois are "the sole and exclusive source for the payment of [unemployment insurance] benefits." Ill. Rev. Stat. ch. 48, ¶ 790. (App. 517). Therefore, while judgments against the states in the cited cases would have diminished their general revenues, a judgment ordering payment of unemployment insurance benefits from IDES could never affect Illinois' general revenues.

The court of appeals acknowledged that this Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) "recognizes a need to balance the supremacy of federal law against the constitutional immunity of the states." App. 21. It also acknowledged, implicitly, that, since the EB program will trigger "on" again only if economic conditions in Illinois deteriorate substantially and the FSC program is now defunct, restitution of EB is the principle, and restitution of FSC is the only means by which the individuals in the two respective groups can vindicate their federal rights. Id. at App. 21.

The court of appeals characterized "[t]he question [it was] asked to resolve ... [as] whether the accrued unemployment compensation benefits sought here will have to be paid out of [the general revenues of the state]." Id. App. 5-6. The court of appeals then acknowledged that restitution of EB and FSC

would not "inevitably come from the general revenues of the State of Illinois," Edelman, 415 U.S. at 665, or indeed, from the state's revenues at all. App. 11-14. Nonetheless, it held that the claimants' interest in "seeking vindication of their federal rights through a retroactive damage award ... is insufficient to override the command of the eleventh amendment." Id. at App. 22.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH TWO LINES OF DECISIONS IN OTHER CIRCUITS

This case presents this Court with an opportunity to resolve two conflicts among the courts of appeal as to the scope of the immunity state officials enjoy under the Eleventh Amendment to the United States Constitution.

A. The circuits are split as to whether judgments for those public benefits which are fully funded by the federal government but

paid through programs administered by the states, are barred by the Eleventh Amendment. The First, Third, Tenth and the D.C. Circuits hold that "retroactive relief [is available] against [a state agency] at least to the extent that [the agency] will be reimbursed by the United States." Bennett v. White, 865 F.2d 1395, 1408 (3d Cir. 1989), cert. denied, 492 U.S. 920 (1989). Accord, Foggs v. Block, 722 F.2d 933, 941 n.6 (1st Cir. 1983), rev'd on other grounds sub nom., Atkins v. Parker, 472 U.S. 115 (1985); Klaips v. Bergland, 715 F.2d 477, 484 (10th Cir. 1983); Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. 1973), cert. denied, 414 U.S. 1104 (1973); Carter v. Butz, 479 F.2d 1084 (3d Cir. 1973), cert. denied, 414 U.S. 1094, 1103 (1973). With the decision below, however, the Seventh Circuit joined the Second and Sixth Circuits in holding that, in a suit against a state official, any judgment for recovery of money, even for benefits that are

fully funded by the federal government, is barred by the Eleventh Amendment. Cotton v. Mansour, 863 F.2d 1241, 1245-47 (6th Cir. 1988), cert. denied, 110 S. Ct. 835 (1990); Colbeth v. Wilson, 554 F. Supp. 539, 544 (D. Vt. 1982), aff'd Colbeth v. O'Rourke, 707 F.2d 57 (2d Cir. 1983) (per curiam).

B. The circuits are also split as to whether judgments payable from funds that are segregated by law from a state's general revenues - which include not only the unemployment trust fund, but other segregated funds as well - are barred by the Eleventh Amendment. Thus, the Fourth Circuit has upheld a judgment payable from the unemployment trust fund. Brown v. Porcher, 660 F.2d 1001, 1006-1007 (4th Cir. 1981), cert. denied, 459 U.S. 1150 (1983), disapproved on other grounds by, Wimberly v. Labor and Industrial Relations Commission of Missouri, 479 U.S. 511 (1987). Similarly, the Fourth, Fifth and Eighth Circuits have

held that the Eleventh Amendment does not bar monetary relief from state funds that are segregated by law from the state's general revenues. Almond v. Boyles, 612 F. Supp. 223, 227-8 (D.C. N.C. 1985) (a judgment payable from the North Carolina State Retirement System not barred by the Eleventh Amendment), aff'd, 792 F.2d 451, 456 (4th Cir. 1986), cert. denied, 479 U.S. 1091 (1987); American Re-Insurance Co. v. Janklow, 676 F.2d 1177, 1184-85 (8th Cir. 1982) (remanded to determine whether a fund created to pay leases was sufficiently segregated from the state's general revenues that an award from the fund would not be barred by the Eleventh Amendment); Schiff v. Williams, 519 F.2d 257, 262 (5th Cir. 1975) (an award from a fund composed of solely of student activities fees collected at a state university not barred by the Eleventh Amendment). And the Third Circuit has held that whether funds are segregated from the state's general revenues

is the "most important factor" in determining whether a judgment for monetary relief in a suit against state officials is barred by the Eleventh Amendment. Blake v. Kline, 612 F.2d 718, 723-24 (3d Cir. 1979) (remanded to determine whether a judgment against funds held to pay pensions by the Public School Retirement Board of Pennsylvania is barred by the Eleventh Amendment), cert. denied, 447 U.S. 921 (1980).

In contrast, in addition to the Seventh Circuit's decision below, the Tenth and Eleventh Circuits hold that the Eleventh Amendment bars a judgment in federal court for unemployment insurance benefits.[9] Esparza

[9] Prior to the ruling below, the Seventh Circuit had upheld judgments payable from both the unemployment trust fund, Jenkins v. Bowling, 691 F.2d 1225, 1235 (7th Cir. 1982), aff'g in relevant part, 80 C 928 (N.D. Ill. 1982), and from the Illinois Toll Highway Trust Fund, which is also segregated from the state's general revenues. Miller-Davis v. Illinois State Toll Highway Authority, 567 F.2d 323 (7th Cir. 1977). Thus, although the court of appeals did not expressly say so, (continued...)

v. Valdez, 862 F.2d 788, 794 (10th Cir. 1988), cert. denied, 492 U.S. 905 (1989); Fincher v. State of Florida Department of Labor, 798 F.2d 1371, 1372 (11th Cir. 1986), cert. denied, 479 U.S. 1072 (1987).

II. THE SEVENTH CIRCUIT'S RULING DECIDES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals held that the source of the funds from which a judgment would be paid is irrelevant to whether the judgment is barred by the Eleventh Amendment. App. 17-18. Thus, under the court of appeals' analysis, that the defendants are state officials is decisive as to whether monetary relief is barred by the Eleventh Amendment even if neither the state nor its officials

[9](...continued)
its decision below can only be understood as overruling the Eleventh Amendment holdings in those decisions. See App. 14-18.

will actually pay the judgment. Id. at App. 18.

This Court's decisions, however, belie this "case caption" understanding of the Eleventh Amendment and confirm that, contrary to the decision below, the source of the funds from which a judgment would be paid is the decisive factor in determining whether a judgment for money is barred by the amendment. For instance, this Court has repeatedly held that whether a federal court can enter a judgment payable by a municipality depends on whether the state's general revenues are the source of the funds from which the judgment would be paid. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 123 n. 34 (1984) (collecting authorities); compare Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280 (1977) (Eleventh Amendment does not bar judgment against municipal corporation when funds would not be paid from the state's general revenues)

with Edelman v. Jordan, 415 U.S. 651 (1974) (Eleventh Amendment bars a judgment for welfare benefits against not just state, but also county officials since the benefits are paid from the state's general revenues).

Similarly, this Court has held that judgments against interstate agencies are not barred by the Eleventh Amendment if, "instead of the state treasury being directly responsible for judgments against [the interstate agency], [the relevant state statute] expressly provides that the obligation of [the agency] shall not be binding on either state." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401-402 (1979) (emphasis in original); see Port Authority Trans-Hudson Corporation v. Feeny, 110 S.Ct. 1868, 1878-80 (1990) (Brennan, J., concurring) (A judgment against an interstate agency whose liabilities are not paid from the states' general revenues is not against "one of the United States"

within the meaning of the Eleventh Amendment).[10] See also, Fitzpatrick v. Bitzer, 427 U.S. 445, 459-60 (1976) (Stevens, J., concurring) (Edelman does not restrict a federal court's "power to enter a judgment payable immediately out of trust assets ... [but instead is] limited to the situation in which the award is payable directly from state funds...."); cf., Missouri v. Jenkins, 491 U.S. 274, 290 (1989) (O'Conner, J., dissenting in part) ("The Eleventh Amendment does not, of course, provide a State with across-the-board immunity from all monetary relief.").

Furthermore, with regard to whether federal funding for the benefits at issue

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[10] The unemployment insurance program is, in essence, an interstate compact, see U.S. CONST. art. I. sec. 10, since FUTA requires that a state's unemployment insurance statute provide that "compensation shall not be denied or reduced to an individual solely because he files a claim in another State ... or because he resides in another State ... at the time he files a claim for unemployment compensation." 26 U.S.C. § 3304(a)(9)(A) (App. 276).

removes the bar of the Eleventh Amendment, at least one district court, after observing that this Court did not question its jurisdiction to consider the merits of the claim in Atkins v. Parker, 472 U.S. 115 (1985), treated that decision as "implicit authority for a federal court's power to consider the merits of claims for all forms of requested relief [in cases against state officials involving benefits fully financed by federal funds]." Griffen v. Coler, 667 F. Supp. 1233, 1242, 1239-42 (C.D. Ill. 1986). If that understanding of Atkins is correct, then the decision below conflicts with this Court's decision in Atkins, too. And, if Griffen's understanding of Atkins is incorrect, then Griffen demonstrates that this Court's Eleventh Amendment rulings leave the lower federal courts uncertain as to whether the Eleventh Amendment bars relief against state officials that will be paid wholly from federal funds. See Section I.A., supra.

III. HANS v. LOUISIANA SHOULD BE CONFINED TO CASES IN WHICH STATES ARE ALLEGED TO HAVE VIOLATED STATE LAW BECAUSE THE PLAINTIFF IN HANS IN FACT PRESENTED ONLY A STATE LAW CLAIM, AND BECAUSE THAT READING OF HANS WOULD VINDICATE THE SUPREMACY OF FEDERAL LAW AND CURE THE INCOHERENCY THAT NOW ATTENDS SOVEREIGN IMMUNITY JURISPRUDENCE

The text of the Eleventh Amendment prohibits federal courts from asserting jurisdiction in "suit[s] ... prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The amendment would, therefore, appear to bar federal jurisdiction only in suits based on a claim that the state defendant violated state law. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 262 (1985) (Brennan, J., dissenting) ("A plaintiff seeking federal jurisdiction against a State under the state-citizen or state-alien diversity clauses would be asserting a cause of action based on state law, since a federal question ... claim would provide an

independent basis for jurisdiction that did not depend on the identity of the parties.").

This is a case in which citizens of Illinois claim that Illinois officials violated federal law. Accordingly, the text of the Eleventh Amendment does not appear to bar restitution regardless of whether the benefits petitioners seek are paid from the state's general revenues. Nonetheless, if restitution would come from Illinois' general revenues, the Eleventh Amendment would bar a federal court from hearing petitioners' claim. Edelman v. Jordan, 415 U.S. 651 (1974). That is so because, "[d]espite the narrowness of its terms, since Hans v. Louisiana, 134 U.S. 1 (1890), [this Court] ha[s] understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial

authority in Article III is limited by this sovereignty." Blatchford v. Native Village, 111 S.Ct. 2578, 2581 (1991). Put differently, as Hans and its progeny are currently interpreted, states are immunized from judgments for monetary relief "even [in] federal claims that otherwise would be within the jurisdiction of the federal courts." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 120 (1984).

The third question presented asks this Court to hold that: (a) Hans is not properly read to bar federal jurisdiction over claims for monetary relief against state officials for violations of federal law; and that (b) consistently, while the Eleventh Amendment establishes that state officials enjoy a constitutional immunity that bars federal jurisdiction in state law claims, those officials retain only a common law sovereign immunity defense against federal law claims. Thus, aside from this Court's resolution of

the other questions presented for review, under the reading of Hans that we urge, the court of appeals' conclusion that the Constitution barred it from hearing petitioners' claims would be erroneous, since petitioners present claims for violations of federal, not state law.

Petitioners recognize that this Court has reconsidered Hans in four recent cases. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Welch v. Texas State Dep't. of Highways & Public Transportation, 483 U.S. 468 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). But plaintiffs in those cases sought to have Hans overruled. In contrast, as explained more fully below, petitioners submit that not only Hans itself, but also much of its progeny, were correctly decided since Hans and many of the cases decided under its authority are properly understood to have concerned state law claims

over which the Eleventh Amendment does bar federal jurisdiction.

Moreover, had this Court overruled Hans in any one of those four recent cases, the result would have been to confine the reach of the Eleventh Amendment to its literal terms, i.e. to diversity cases. In contrast, the petitioners' position is that the amendment bars federal jurisdiction in all state law claims against states or their officials, regardless of the jurisdictional basis on which such claims would otherwise be heard in federal court. See, e.g, 28 U.S.C. § 1367 (supplemental jurisdiction over state claims). Finally, under petitioners' theory, though the Eleventh Amendment would be confined to state law claims, the states would retain their common law immunity, thereby meeting some, though concededly not all, of the concerns animating the current rule that the states enjoy a constitutional

immunity that bars federal jurisdiction in federal claims for monetary relief.

The reasons for reconsidering whether Hans and the Eleventh Amendment should be read to bar a federal court from asserting jurisdiction over federal claims against state officials, and for doing so in this case, are compelling:

A. Although the plaintiff in Hans invoked the federal court's jurisdiction because the case arose under federal law within the meaning of Article III of the Constitution, he actually presented only a state law claim. Specifically, Hans concerned a state law contract claim in which a federal question arose only in reply to the state's defense, i.e., that the state provision purporting to repudiate the debt violated the Contracts Clause of the Constitution. 134 U.S. at 10, 15; see Burnham, Taming the Eleventh Amendment Without Overruling Hans

v. Louisiana, 40 Case W. Res. L.Rev. 931, 948-55, 977-80 (1990).

Hans, however, was decided in 1890. Eighteen years later, in Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908), this Court first held that, unlike the "arising under" language in Article III, that same language in the statute creating federal-question jurisdiction (now 28 U.S.C. § 1331) only provides for federal jurisdiction over cases in which "the federal question ... appear[s] on the face of a well-pleaded complaint and ... [did] not enter in anticipation of a defense." Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983) (citing, inter alia, Mottley, 211 U.S. at 149). Prior to Mottley, however, and thus when Hans was decided, the Court treated a state law claim in which the plaintiff alleged that a defense was unconstitutional as a case "arising under" federal law within the meaning

of the federal-question statute. See Hans, 134 U.S. at 10, 15.

This Court has correctly held that the Eleventh Amendment bars federal jurisdiction in any suit in which the plaintiff alleges that a state or its officials violated state law even if the plaintiff seeks to invoke federal jurisdiction on a basis other than diversity of the parties. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). Pennhurst is premised on an appreciation that there is no "greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Id. at 106. Yet if the amendment was construed to extend only to diversity cases, any plaintiff with a state law claim who could find a basis other than diversity for invoking federal jurisdiction could circumvent "the

principles of federalism that underlie the Eleventh Amendment." Id.[11]

The Constitution's treatment of federal jurisdiction over state law claims like the one in Hans, where the Court properly held that the suit was barred by the Eleventh Amendment, is to be contrasted with its treatment of claims for violation of federal law. The Constitution gives Congress the power to allow federal courts to hear federal-question claims. U.S. CONST. art. III, sec. 2. And Congress has exercised that option to permit federal courts to hear claims for violations of federal law. 28 U.S.C. § 1331;

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[11] Indeed, although the Eleventh Amendment was enacted to overrule Chisholm v. Georgia, 2 Dall. 418 (1793), before Mottley, any interpretation of the Eleventh Amendment that did not bar federal jurisdiction in all state law claims would have permitted federal courts to hear suits indistinguishable from Chisholm since any plaintiff in Chisholm's position could, like Hans, have urged that the state's refusal to pay its debt violated the Contracts Clause and, thus, that the case arose under the Constitution.

see Verlinden B. V., 461 U.S. at 494; Mottley, 211 U.S. 149.

Moreover, while the Eleventh Amendment confirms that a federal court cannot "instruct[] state officials on how to conform their conduct to state law," Pennhurst, 465 U.S. at 106, the Supremacy Clause confirms that "[not]hing in the Constitution and Laws of any State," including a state's sovereign immunity doctrine, can limit a federal court from providing effective remedies for a state official's violation of the "Constitution and the Laws of the United States" since those are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Therefore, that part of the Court's Eleventh Amendment doctrine that extends the amendment's jurisdictional bar to claims for violation of federal law "is inconsistent with the essential function of the federal courts - to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the

land...." Atascadero, 473 U.S. at 255-7 (Brennan, J., dissenting).

B. Reading Hans as holding that the Constitution bars claims for violation of federal law not only undermines the Supremacy Clause, it results in substantial inscoherence in the constitutional jurisprudence of sovereign immunity. See Union Gas Co., 491 U.S. at 25 (Stevens, J. concurring) (describing Hans as having "departed from the plain language, purpose and history of the Eleventh Amendment," and relating that departure to the "Court's inability to develop a coherent doctrine of Eleventh Amendment immunity...."); Welch, 483 U.S. at 519 & n. 19 (Brennan, J., dissenting) ("progeny of Hans has produced erratic and irrational results.").

This incoherency can be understood by juxtaposing two sets of this Court's rulings. One set proclaims that the United States Constitution bars federal courts from

asserting jurisdiction over federal claims against states. See Blatchford, 111 S. Ct. at 2581 (judicial authority of federal courts under Article III is limited by the Eleventh Amendment); Edelman, 415 U.S. at 673-4 (Eleventh Amendment bars federal courts from hearing federal law claims against states for welfare benefits). The other set ignores commonly understood dictates of any such constitutional rules -- for example, that parties cannot invoke federal jurisdiction by consent or that Congress cannot override a constitutional limit on federal jurisdiction -- by treating the state's immunity as if it were based in the common law. See Atascadaro State Hospital, 473 U.S. at 238 (state may waive Eleventh Amendment immunity to suit and so confer jurisdiction on federal court); Union Gas Co., 491 U.S. at 13-19 (Congress may override the Eleventh Amendment in exercise of its authority under commerce clause). See also Fitzpatrick v. Bitzer, 427

U.S. 445, 459 (1976) (Stevens, J. concurring) (Since the Eleventh Amendment applies by its terms to "any suit in law or equity," any "construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant [is problematic]."). Moreover, part of the "crazy quilt pattern of the Hans doctrine," Welch 483 U.S. at 519 & n. 19 (Brennan, J., dissenting), is that some cases are part of both sets. See Blatchford, 111 S. Ct. 2578 (treating state's immunity both as preexisting the Constitution and surviving its ratification "intact," id at 2581, and yet as grounded in the Constitution itself.).

If this Court accepted petitioners' understanding of Hans and the reach of the Eleventh Amendment, it would resolve the incoherence in the jurisprudence of sovereign immunity, while assuring the supremacy of federal law and preserving a measure of the

immunity to suit in federal court that states now enjoy. For example, if the Constitution's jurisdictional bar against suits in federal court was limited to state claims, that jurisdictional bar could neither be waived by the parties to a suit nor abrogated by Congress. In contrast, however, if the Eleventh Amendment did not bar federal jurisdiction over claims against state officials for violation of federal law, the states could interpose their common law sovereign immunity defense against federal claims, but that defense, like any non-constitutional defense, could be waived. Moreover, the extent to which a state's common law sovereign immunity defense succeeded would turn on whether it "so interfere[d] with and frustrate[d] the substantive right Congress enacted that, under the Supremacy Clause, [it] must yield to the federal interest." Felder v. Casey, 487 U.S. 131, 151 (1988). Accord,

Howlett v. Rose 110 S. Ct. 2430 (1990) (unanimous).

C. To the extent that Hans is understood to extend a constitutional bar to the assertion of federal jurisdiction over claims for monetary relief based on violations of federal law, it is not merely confusing; it represents the kind of "unworkable or ... badly reasoned [decision that] 'this Court has never felt constrained to follow [as] precedent.'" Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)). Indeed, for precisely that reason, this Court's decisions extending the Eleventh Amendment's jurisdictional bar to suits challenging state officials' violations of federal law have been "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions." Id. at 2611. See e.g., Edelman v. Jordan, 415 U.S. at 678 (Douglas, J., dissenting); id. at 687

(Brennan, J., dissenting); id. at 688 (Blackmun, J., dissenting); Atascadero State Hospital, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting); id. at 302-04 (Blackmun, J., dissenting); id. at 304 (Stevens, J., dissenting).[12]

D. Some members of this Court have been reluctant to overrule Hans because it has been cited as dispositive in many subsequent cases. Union Gas Co., 491 U.S. at 34-5 (Scalia, J., dissenting in part) (citing Welch, 483 U.S. at 494 n.27 (plurality opinion)). Under petitioners' Eleventh Amendment theory, however, Hans itself and much of its progeny would be reaffirmed, not overruled. For example, Pennhurst, 465 U.S. at 97-106, in which the Court held that state law claims against state officials that are brought in

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[12] Academics have also been sharply critical of those decisions. See e.g., Union Gas Co., 491 U.S. at 24 n. 1 (Stevens, J., concurring) (collecting authorities); Atascadero, 473 U.S. at 258 n. 11 (Brennan, J., dissenting) (same).

federal court under the pendent jurisdiction doctrine are barred by the Eleventh Amendment, would be reaffirmed under our theory. Indeed, "[a] close analysis of [the] cases [listed by Justice Powell in Welch, 483 U.S. at 494 n. 27] indicates that the stare decisis problems involved in a revised reading of Hans, while serious, are not nearly as grave as they would be if the Court overruled Hans." Burnham, supra, 40 Case W. Res. L. Rev. at 977; see id. at 976-84 (analyzing all of the cases cited by Justice Powell in footnote 27 in Welch); Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity, 98 Yale L. J. 1, 119-124 (1988) (same).[13]

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[13] In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), this Court held that, except in suits for prospective injunctive relief, states and their officials are not "persons" within the meaning of 42 U.S.C. § 1983, thus interpreting § 1983 coextensively with the Eleventh Amendment. Under that analysis, narrowing the limits of Eleventh Amendment immunity would expand § (continued...)

E. Some members of this Court have been concerned about the possible reliance of the states and of Congress on the understanding that Hans extended a constitutional and jurisdictional bar to suits against state officials even for violations of federal law. See, e.g., Union Gas Co., 491 U.S. at 34-5 (Scalia, J., dissenting in part). Those supposed reliance problems can be overstated. See Burnham, supra, 40 Case W. Res. L. Rev. at 990-95. But in any event, purely prospective application of the new Eleventh Amendment rule that petitioners urge can protect the reliance interests of both the states, see American Trucking Assns. v. Smith,

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[13](...continued)
1983's definition of "person" to include some forms of relief against states through suits against their officials. But a state's liability would still be limited to deprivations caused by unlawful official policies, customs or usages; states would not be liable merely by virtue of unlawful acts of their agents. See City of St. Louis v. Praprotnik, 485 U.S 112, 121-27 (1988); Monell v. New York City Dep't. of Social Services, 436 U.S. 658, 691 (1978).

110 S. Ct. 2323 (1990) (plurality opinion); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2448 (1991) (White, J., concurring); id. at 2452 (O'Connor, J., dissenting), and the Congress, see Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 87-88 (1982) (staying judgment declaring the grant of jurisdiction to the bankruptcy courts unconstitutional to apply the decision prospectively only and thus to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.").

Moreover, this Court can afford relief to the petitioners even if a new Eleventh Amendment rule is announced prospectively. Under this course, the new Eleventh Amendment rule (limiting the reach of the amendment to state law claims) would not be applied even

to the petitioners. Rather relief would be extended to them based on their alternative and narrower theory that, even the current understanding of the Eleventh Amendment does not bar restitution from federal funds or from funds that are segregated by law from a state's general revenues. See Sections I. and II., supra. This narrower ruling would then be applied retroactively, i.e., to petitioners themselves and to all other litigants similarly situated. This result, while protecting legitimate reliance interests, would respect the view that legal rules applied to litigants before the Court must always be applied retroactively. See James B. Beam Distilling Co., 111 S. Ct. 2439 (Souter, J., announcing judgment of the Court).

CONCLUSION

The petition for certiorari should be granted.

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